

**UNITED STATES DISTRICT COURT
FOR THE
EASTERN DISTRICT OF OKLAHOMA**

UNITED STATES OF AMERICA,)	
)	
<i>Plaintiff,</i>)	
)	
v.)	Case No. CIV 96-196 B
)	
CITY OF STILWELL, OKLAHOMA,)	Filed: July 16, 1998
ET AL.,)	
)	
<i>Defendants.</i>)	

COMPETITIVE IMPACT STATEMENT

The United States, pursuant to Section 2(b) of the Antitrust Procedures and Penalties Act (“APPA”), 15 U.S.C. § 16(b)-(h), files this Competitive Impact Statement relating to the proposed Final Judgment submitted for entry in this civil antitrust proceeding.

I. NATURE AND PURPOSE OF THIS PROCEEDING

On April 25, 1996, the United States filed a Complaint alleging that the defendants City of Stilwell, Oklahoma (“City”) and Stilwell Area Development Authority (“ADA”) (collectively “Defendants”) had violated the Sections 1 and 2 of the Sherman Act, 15 U.S.C. §§ 1 and 2. The Complaint challenged a utility policy adopted and implemented by Defendants, the sole suppliers of public water and sewer services to customers within the Stilwell city limits, by which Defendants refused to extend or connect water or sewer lines to customers unless the customers also agreed to purchase electric service from the City’s Utility Department. The

effect of this policy, commonly referred to as the “all-or-none utility policy,” has been to restrict competition in the provision of electric services in newly annexed areas of Stilwell.

On July 15, 1998, the United States and Defendants filed a Stipulation and Order consenting to the entry of a proposed Final Judgment designed to eliminate the all-or-none utility policy and prevent Defendants from implementing any similar restriction in the future. Under the proposed Final Judgment, Defendants would be enjoined from requiring any consumer of electric energy to purchase retail electric service from Defendants as a condition of receiving water or sewer service from Defendants, and would be enjoined from taking actions to impose any similar restrictions on City residents in the future. The proposed Final Judgment also requires that any application for water or sewer service or other written materials distributed by Defendants to prospective applicants include a disclaimer stating that customers are not required to purchase City electricity as a condition of receiving water or sewer service.

The United States and Defendants have stipulated that the proposed Final Judgment may be entered after compliance with the APPA. Entry of the proposed Final Judgment would terminate the action, except that the Court would retain jurisdiction to construe, modify, or enforce the provisions of the proposed Final Judgment and to punish violations thereof.

II. DESCRIPTION OF THE EVENTS GIVING RISE TO THE ALLEGED VIOLATION

The City of Stilwell is a charter municipality, organized and existing under the laws of the State of Oklahoma. Its Utility Department was established by Section 106 of the City’s Charter as a business enterprise to provide electricity within and around the City’s corporate boundaries. The Utility Department is governed by a Utility Board of five members appointed by the Mayor with the approval of the City Council and is subject to the Council’s oversight.

The Stilwell Area Development Authority (“ADA”) is a public trust, organized and existing under Oklahoma law, to provide water and sewer service for compensation within and around the City’s corporate boundaries. It is governed by a Board of Trustees whose membership is identical to that of the City’s Utility Board and which is likewise subject to the Council’s oversight.

Defendants provide water, sewer, and electric service in Stilwell. Within the pre-1961 boundaries of Stilwell, the City’s Utility Department is the sole provider of electric service. But in areas of Stilwell annexed since that time, the City competes with Ozarks Rural Electric Cooperative (“Ozarks”) for sales to new electric service customers. In both pre-1961 Stilwell and areas subsequently annexed, Defendants have a virtual monopoly on the sale of water and sewer services.

Beginning as early as 1985, the Defendants adopted an all-or-none utility policy, refusing water and sewer services to any customer who did not agree to purchase electric service from the City. The purpose of the policy was to prevent Ozarks from obtaining new electric customers in the annexed areas. The Utility Department and ADA formalized the all-or-none utility policy in 1994, and the Stilwell City Council subsequently approved the policy.

To enforce its all-or-none policy, the Defendants denied water and sewer connections, turned off already connected lines, and otherwise discriminated against those customers in annexed areas who tried to obtain electric service from Ozarks. Defendants’ enforcement of the policy deprived consumers of their right to choose freely among competing electric service providers on the basis of price and quality of service and eliminated competition in the provision of electric service in the annexed areas.

III. EXPLANATION OF THE PROPOSED FINAL JUDGMENT

The provisions of the proposed Final Judgment are designed to eliminate Defendants' all-or-none utility policy and to prevent future actions by Defendants to place similar restrictions on electric consumers. The proposed Final Judgment would enjoin Defendants from requiring any consumer of electricity to purchase the City's retail electric service as a condition of receiving water or sewer service from the City (Section IV(A)). In addition, the proposed Final Judgment would require defendants to include the following disclaimer in a conspicuous manner in any application for water or sewer service or in any other written materials they distribute to prospective applicants for water or sewer services:

Although we provide electric service, as well as water and sewer services, we do not require you to purchase electric service from us as a condition of receiving water or sewer service and we will not discriminate against you if you do not purchase electric service from us.

(Section IV(B)). Defendants would also be enjoined from threatening or discriminating or retaliating against any person because that person had not agreed to purchase or did not purchase electric service from Defendants (Section IV(C)).

The proposed Final Judgment would further require Defendants to establish and maintain an antitrust compliance program (Section VI) and file an annual certificate of compliance with the United States (Section VII). It would also provide that the United States may obtain information from the Defendants concerning possible violations of the Final Judgment (Section VIII).

The proposed Final Judgment would not prohibit Defendants from exercising any right under State law to expropriate facilities used by any retail electric supplier to furnish electricity within the City's corporate boundaries, or from commencing or prosecuting, in good faith,

litigation to ascertain or protect any right they might have under State law to restrict the furnishing of electricity within the City's corporate boundaries to retail electric suppliers authorized by law to do so (Section V(A) and (B)).

IV. REMEDIES AVAILABLE TO POTENTIAL PRIVATE LITIGANTS

Section 4 of the Clayton Act, 15 U.S.C. § 15, provides that any person who has been injured as a result of conduct prohibited by the antitrust laws may bring suit in federal court to recover three times the damages the person has suffered, as well as costs and reasonable attorneys' fees. Entry of the proposed Final Judgment will neither impair nor assist the bringing of any private antitrust damage action. Under the provisions of Section 5(a) of the Clayton Act, 15 U.S.C. § 16(a), the proposed Final Judgment has no *prima facie* effect in any subsequent private lawsuit that may be brought against defendants.

V. PROCEDURES AVAILABLE FOR MODIFICATION OF THE PROPOSED FINAL JUDGMENT

The United States and Defendants have stipulated that the proposed Final Judgment may be entered by the Court after compliance with the provisions of the APPA, provided that the United States has not withdrawn its consent. The APPA conditions entry upon the Court's determination that the proposed Final Judgment is in the public interest.

The APPA provides a period of at least sixty days preceding the effective date of the proposed Final Judgment within which any person may submit to the United States written comments regarding the proposed Final Judgment. Any person who wishes to comment should do so within sixty days of the date of publication of this Competitive Impact Statement in the Federal Register. The United States will evaluate and respond to the comments. All comments

will be given due consideration by the Department of Justice, which remains free to withdraw its consent to the proposed Judgment at any time prior to entry. The comments and the responses of the United States will be filed with the Court and published in the Federal Register.

Written comments should be submitted to:

Roger W. Fones
Chief, Transportation, Energy & Agriculture Section
Antitrust Division
United States Department of Justice
325 Seventh Street, N.W., Suite 500
Washington, D.C. 20004

The proposed Final Judgment provides that the Court retains jurisdiction over this action, and the parties may apply to the Court for any order necessary or appropriate for the modification, interpretation, or enforcement of the Final Judgment. The Proposed Final Judgment would expire ten (10) years from the date of its entry.

VI. ALTERNATIVES TO THE PROPOSED FINAL JUDGMENT

The United States considered, as an alternative to the proposed Final Judgment, a full trial on the merits against Defendants. In the view of the Department of Justice, such a trial would involve substantial cost to the United States and is not warranted. The proposed Final Judgment provides relief that fully remedies the alleged violations of the Sherman Act set forth in the Complaint.

VII. DETERMINATIVE DOCUMENTS

There are no determinative materials or documents within the meaning of the APPA that were considered by the United States in formulating the proposed Final Judgment.

FOR PLAINTIFF UNITED STATES OF AMERICA:

Dated: July 15, 1998

Respectfully submitted,

_____/S/
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